IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 22, 2009

STATE OF TENNESSEE v. ALBERT L. SCHLIEF

Appeal from the Criminal Court for Hamilton County
No. 242001 Don W. Poole, Judge

No. E2008-02147-CCA-R3-CD - Filed March 15, 2010

A Hamilton County Criminal Court jury convicted the defendant, Albert L. Schlief, of two counts of rape of a child, *see* T.C.A. § 39-13-522 (1997), and one count of solicitation of rape of a child, *see id.* §§ 39-13-522, 39-12-102. The trial court imposed concurrent sentences of 20 years for each rape of a child conviction and three years for solicitation of rape of a child. In this appeal, the defendant contends that the trial court should have granted a mistrial based upon the State's failure to timely disclose exculpatory evidence, an error which the defendant contends was compounded by the prosecutor's improper closing argument. The defendant also complains that the trial court prevented him from presenting a defense and that the trial court erred by prohibiting the jury from examining a letter written by one of the victims. The defendant also challenges the sufficiency of the convicting evidence and argues that the cumulative effect of the errors at trial entitles him to a new trial. Discerning no reversible error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Samuel F. Robinson III, Chattanooga, Tennessee (on appeal); and Jes Beard, Chattanooga, Tennessee (at trial), for the appellant, Albert L. Schlief.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; William H. Cox, III, District Attorney General; and Leslie Longshore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The convictions in this case arose from events that occurred on May 25, 2002. The victims in this case, H.R. and K.R., alleged that on that date the defendant, who was their grandmother's husband, engaged in various sexual activities with both of them and forced them to engage in sexual activities with each other.

K.R., who had turned 18 by the time of trial, testified that he was born on October 1, 1989, and that on May 25, 2002, he was 12 years old. On that day, the defendant, whom he called "Papaw," picked up him and his sister, H.R., from the home they shared with their mother so that they could spend the night with him. K.R. recalled that his grandmother, the defendant's wife, was in Virginia visiting a friend of the family. K.R. stated that after the defendant picked them up, he took them to the store to get some beer and then drove them to his home in Soddy Daisy. There, the defendant and the children prepared for the arrival of the defendant's friends. When the defendant's friends did not arrive as planned, the defendant, K.R., and H.R. "started watching dirty movies and . . . playing 21." K.R. remembered that the defendant asked the victims if they wanted "to play strip poker with this game 21." K.R. explained the game, "So if you lost, if you busted, if you lost, you had to take a shirt or your pants off. And . . . we all ended up naked." K.R. added, "[W]e watched movies a little bit more and then we played truth or dare with each other." During the game of truth or dare, the defendant dared K.R. to lick his sister's vagina, and K.R. "dared [the defendant] to do the same." K.R. testified that the defendant then "tried to have sex with [H.R.] and he couldn't because her hole was too small, and then we cleaned up a little bit and I think that's about it."

K.R. confirmed that both he and the defendant licked H.R.'s vagina. K.R. testified that the defendant asked K.R. to "do him in the butt," and K.R. complied by "stick[ing] [his] penis in [the defendant's] butt." K.R. said he felt "a little weird, like [he] shouldn't have done it." He said this was the first and only time he had sexual contact with the defendant. K.R. stated that he also placed his penis in H.R.'s anus at the defendant's urging but stopped when she complained that it hurt.

K.R. testified that in the weeks following the incident he feared that he might be "gay," and so he told his mother's boyfriend, Victor Koyak, what had happened. He stated that Mr. Koyak later told K.R.'s mother, who called the police.

During cross-examination, K.R. testified that he drank a single Natural Ice beer that the defendant provided him and denied drinking beer after the defendant went to bed. He recalled that H.R. drank at least one wine cooler. K.R. admitted that he told an interviewer at the Children's Advocacy Center ("CAC") that the defendant had not touched

him. He denied that Mr. Koyak told him to accuse the defendant as a means of retribution. K.R. confirmed that he and H.R. stayed with the defendant "whenever [they] wanted" and that they continued to visit the defendant after the offenses.

During redirect examination, K.R. explained that when the CAC interviewer asked whether the defendant had "touched" K.R., K.R. thought the interviewer meant with his hands. He insisted that he had penetrated the defendant's anus with his penis.

H.R., 16 years old at the time of trial, testified that she was born on January 26, 1992, and that she was 10 years old at the time of the offenses. She recalled that on May 25, 2002, the defendant took her and her brother driving and allowed each of them to drive his van. She testified that he then took them to the store, where he allowed her to choose a wine cooler to drink. When they returned to the defendant's residence, the defendant showed them a pornographic movie, and they played a card game. She described the game, "[H]e called it strip poker, and I guess . . . I don't remember how it went, but people had to take their clothes off if they lost or win or something like that, and we all ended up with our clothes off." She stated that the defendant then "started messing around" with her and K.R. "sexually." She recalled that the defendant tried to penetrate her anus with his penis, that the defendant tried to penetrate K.R.'s anus with his penis, and that K.R. tried to penetrate the defendant's anus with his penis. H.R. stated that she drank "a couple" of wine coolers and did not remember the defendant touching her in any other way. She said that K.R. also attempted to penetrate her anally.

H.R. testified that she never told anyone about the abuse and that she "would never have said anything" if her brother had not revealed the abuse because she was "scared." She recalled that several years after the offenses, her grandmother, Rosa Schlief, approached her and asked her to "change [her] story and . . . say that it didn't happen." She testified that Ms. Schlief told her that Ms. Schlief "had people watching [H.R.] and she could get [H.R.] in a lot of trouble and get [H.R.] put in juvenile." H.R. recalled that when she refused to change her story, Ms. Schlief "got out a notebook and everything and tried to get [H.R.] to write something like [H.R.] lied about it." H.R. insisted that she never drafted such a document.

During cross-examination, H.R. admitted that she had been in and out of several different schools during the years between the offenses and the trial and conceded that she had finally dropped out of school altogether. She acknowledged that her brother's and her grandfather's placing their mouths on her vagina would have been memorable but insisted that she could not recall either having done so because she had tried to "block it out." She admitted that she did not tell the CAC interviewer that either K.R. or the defendant performed oral sex on her or that she performed oral sex on either of them. She also

conceded that she told the interviewer that K.R. and the defendant had only attempted to penetrate her anally. She said, "They put it up to it and tried to put it in." She confirmed that although both touched her anus, neither successfully penetrated her.

During redirect examination, H.R. stated that she knew the defendant was trying to penetrate her anus with his penis because she "felt him" "on [her] butt."

Mary Kathryn Spada testified that she was employed by T.C. Thompson's Children's Hospital to "provide medical care for the children at the Children's Advocacy Center." She performed sexual assault exams on both victims in this case in July 2002. Ms. Spada recalled that K.R.'s exam was "completely normal" and explained that such a finding was not "unusual" given that "the main purpose of the anal area is to dilate or expand and then contract." She stated that H.R.'s exam established that "everything looked good." Neither child showed physical manifestations of the earlier abuse, which, she explained, was expected given the delay in reporting in this case.

During cross-examination, Ms. Spada acknowledged that neither K.R. nor H.R. appeared upset during the examination but that she had recommended counseling for both of them. She stated that K.R. was uncircumcised and that uncircumcised males must take extra precautions when cleaning their penises. She recalled that K.R. appeared to have taken these precautions.

Hamilton County Sheriff's Department Sergeant Robert Starnes, who was the lead investigator in the case, testified that he did not interview either of the victims and instead sent them to the CAC to undergo forensic interviews. He explained that he sent the victims to the CAC so that they would not be subjected to multiple interviews by the police, the Department of Children's Services, and the CAC. The single forensic interview was provided to all agencies.

On July 17, 2002, Sergeant Starnes contacted the defendant by telephone and asked him to come to the sheriff's department for an interview. The defendant agreed, and when he arrived, Sergeant Starnes informed him of his *Miranda* rights. Sergeant Starnes explained that he informed the defendant of his rights even though the defendant was not in custody. During the interview, the defendant confirmed that the victims stayed with him on May 25, 2002, while his wife was in Virginia visiting a friend of the family. The defendant told Sergeant Starnes that he took the children driving, bought them wine coolers to drink, and then took them back to his residence. He also told the officer that he took "nerve pills" and drank two beers on the day of the offenses. The defendant said of the offenses, "If something had happened, it would have been because of the medicine." When Sergeant Starnes asked the defendant about his possession of pornographic videos, the defendant

ended the interview and refused to allow officers to search his home. Sergeant Starnes stated that he did not record his interview with the defendant because he did not have the equipment to do so at that time and because he did not think the defendant would consent to being recorded.

During cross-examination, Sergeant Starnes admitted that there were conflicts in the statements provided by K.R. and H.R. Specifically, he confirmed that although K.R. said that he and the defendant had licked H.R.'s vagina, H.R. "said it didn't happen"; that although K.R. said that the defendant tried to penetrate H.R. vaginally, H.R. denied it; that although K.R. said that H.R. had performed oral sex on both him and the defendant, H.R. denied doing so. Sergeant Starnes acknowledged that he had not attempted to reconcile these conflicts.

Private Investigator Linda Marcum testified that she was hired by "several" bonding companies to locate the defendant after he fled the jurisdiction in 2004. She recalled that she searched for the defendant in Tennessee, Florida, and South Carolina before finally locating him in rural Rutherford County, North Carolina, on December 21, 2004. She stated that the defendant and his wife were living in a mobile home behind a junk yard. When she found him, the defendant admitted to Ms. Marcum that he had evaded authorities for nine months.

The State rested, and the defense called Roy Cooper, a forensic document examiner, who testified on behalf of the defendant that he could say with 90 percent certainty that H.R. had written the document that said the defendant did not rape her. During cross-examination, Mr. Cooper acknowledged that he had no personal knowledge whether the "known" writing samples provided to him by the defense were actually written by H.R.

Brittany Graybiel testified that H.R. came to live with her and her mother when Ms. Graybiel's mother had "guardianship" of H.R. in 2006. She stated that during that time H.R. had a reputation for dishonesty.

The defendant's wife, Rosa Schlief, testified that in 2005 H.R. told her, "Nanny, [the defendant] didn't rape me," so Ms. Schlief asked H.R. to "write that on paper and sign it saying he didn't do it." Ms. Schlief stated that she took a tape recorder with her to meet H.R., but H.R. "said she wasn't allowed to talk to [Ms. Schlief] if [Ms. Schlief] was going to record the conversation." Ms. Schlief denied threatening or coercing H.R. to write the statement of denial.

Ms. Schlief stated that she fled the jurisdiction with the defendant in early 2004 because they feared he would be found guilty and would "have to go to prison for 20 years."

She insisted that her husband was innocent, saying, "I know he didn't do it, I been married to him for 20 years." She recalled that the defendant's medication rendered him impotent and that he would have to stop taking his medication for "four or five days" in order for them to engage in marital relations. She stated that after May 25, 2002, the victims continued to visit her and the defendant at their residence and that they behaved toward the defendant "the same as they always had."

During cross-examination, Ms. Schlief admitted that she had pleaded guilty to coercion of a witness in relation to procuring the statement of denial from H.R. She insisted, however, that she was not guilty of coercion.

The defendant testified that on May 25, 2002, he picked the victims up after he finished work and took them to practice driving. After they finished driving practice, he took them to the store where he bought each of them a wine cooler and a six pack of beer for himself. He stated that he allowed the victims to drink the wine coolers because he had seen their mother allow them to drink wine occasionally. He then drove them to his residence, where he cooked hot dogs for dinner and the children watched television. The defendant stated that after dinner, he took his medication and went to bed early, admonishing the children "to hold it down to a gentle roar." The defendant denied watching pornography with the victims, playing cards, playing truth or dare, and taking off his clothes in front of the victims. He stated that he "absolutely" did not touch either child sexually. The defendant testified that the victims continued to visit him at his residence for several weeks after that night.

The defendant said that he had previously showed his penis, which was uncircumcised, to K.R. when he taught K.R. how to properly clean his penis. He said he was prompted to provide the demonstration because K.R. had been complaining of pain. He testified that the medication he took for his nerve disease rendered him impotent. He said that he had to stop taking the medication for several days in order to maintain an erection. The defendant admitted going "on the run" about a year after his arrest on the charges in this case because he "was not guilty and . . . was scared to death." He said he was afraid he would go to prison.

The defendant insisted that he had never had sexual contact with either of the victims. He said he believed the charges stemmed from his decision to tell the victims' mother that her boyfriend, Victor, had been smoking marijuana with K.R. He recalled that K.R. was very upset that the defendant had revealed the information, which K.R. had told him in confidence.

At the conclusion of the proof, the jury found the defendant guilty of rape of

a child in count one for the anal penetration of H.R., guilty of rape of a child in count four for allowing K.R. to penetrate him anally, and guilty of the solicitation of rape of a child in count six for urging K.R. to orally penetrate H.R.

I. Disclosure of Victims' Statements

In his first issue, the defendant contends that the trial court should have granted his request for a mistrial after the State failed to timely disclose statements made by both victims during forensic interviews at the CAC that he claims are "completely contradictory and inconsistent." He argues that the delayed disclosure of the statements "deprived the [d]efendant of an opportunity to fully compare the statements and prepare a proper cross-examination." The State asserts that even if the victims' statements to the CAC were exculpatory, the defendant has failed to establish that their untimely disclosure prejudiced him in any way.

At a motions hearing on February 12, 2007, the defendant noted that although he had previously requested any pretrial statements provided by the victims, he had not been provided with the forensic interviews conducted by the CAC or the victims' school and counseling records. The State responded that the records of both Child Protective Services and the CAC were "confidential" pursuant to statute and would be provided prior to trial only if "Brady overrides that confidentiality." The State also observed that any statements provided to the CAC would be disclosed following the witness's testimony pursuant to *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007 (1957). The defendant, in turn, argued that "there's no way [the forensic interviews are] not exculpatory." At the conclusion of that hearing, the court concluded that it would examine the forensic interviews *in camera* and determine whether they should be disclosed prior to trial.

We note that although the defendant claimed making requests for the forensic interviews with the victims prior to the February 12, 2007 motions hearing, no written motions for general or specific discovery appear in the record. Indeed, defense counsel noted at a motions hearing held on November 7, 2007, that he had "not yet made a Rule 16 request" and that he had specifically refrained from filing a motion for discovery to avoid complying with the State's request for reciprocal discovery. The State noted that although the defendant had not actually filed a pleading titled "Motion for Discovery," he had "filed motions and written letters" requesting "discoverable material." Defense counsel also noted that he had made no "formal request for Brady material," but he stressed that the State had a duty under *Brady* to disclose exculpatory material.[1] On that same date, however, defense counsel indicated his intent to file a discovery request pursuant to Rule 16 of the Tennessee Rules of

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

Criminal Procedure. No such document appears in the record on appeal.

During his cross-examination of H.R., defense counsel asked the trial court to grant a "mistrial, if not . . . dismissal" on the basis of the State's failure to disclose the forensic interviews conducted with the victims at the CAC. He argued that the interviews were clearly exculpatory because H.R. denied performing oral sex on either the defendant or K.R., denied either K.R.'s or the defendant's performing oral sex on her, denied vaginal penetration by either K.R. or the defendant, and denied that either K.R. or the defendant completely penetrated her anus. He noted that H.R.'s statement was in complete conflict with K.R.'s. He stated that although he requested the documents far in advance of trial, he was provided with K.R.'s statement at the conclusion of K.R.'s direct testimony and with H.R's statement when the State used it during direct examination to refresh her recollection.

The trial court overruled the defendant's motion, noting that there was "substantial law . . . that you're not entitled to those . . . statements from the Children's Advocacy Center at all." The court disagreed that *Brady* required disclosure of the documents even if they were exculpatory. Finally, the court concluded that the defendant had ultimately been provided with the documents and that counsel cross-examined the victims with the statements "in minute detail."

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S. Ct. at 1196-97. "Evidence 'favorable to an accused' includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the [S]tate's witnesses." *Johnson v. State*, 38 S.W.3d 52, 55-56 (Tenn. 2001) (citing *State v. Walker*, 910 S.W.2d 381, 389 (Tenn. 1995); *State v. Copeland*, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998); *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985)).

To prove a *Brady* violation, a defendant must demonstrate:

> (1) that he requested the information (unless the evidence is obviously exculpatory, in which case the [S]tate is bound to release the information whether requested or not),
>
> (2) that the State suppressed the information,
>
> (3) that the information was favorable to the defendant, and

(4) that the information was material.

Johnson, 38 S.W.3d at 56 (citing *State v. Edgin*, 902 S.W.2d 387, 390 (Tenn. 1995); *Walker*, 910 S.W.2d at 389). The evidence is deemed material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'

Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995) (quoting *Bagley*, 473 U.S. at 678, 105 S. Ct. at 3381). In the case of a delayed disclosure of exculpatory information, as opposed to a complete failure to disclose, the inquiry is whether the delay prevented the defense from effectively preparing for and presenting the defendant's case. *State v. Caughron*, 855 S.W.2d 526, 548 (Tenn. 1993); *see Bagley*, 473 U.S. at 682, 105 S. Ct. at 3384 (failure to respond to *Brady* request may impair adversary process because defense "might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued").

Here, the defendant, at least orally, specifically requested copies of the written summaries of the forensic interviews conducted of K.R. and H.R. at the CAC. The trial court ruled that pursuant to statute, the documents were not discoverable.[2] The defendant agreed that the documents were protected from general discovery but argued that they should be disclosed if exculpatory. The State, maintaining that neither statement was exculpatory, did not disclose the documents prior to trial. We cannot agree with the State's assessment that

[2]Tennessee Code Annotated section 37-1-612 provides that "all records concerning reports of child sexual abuse, including files, reports, records, communications and working papers related to investigations or providing services; video tapes; reports made to the abuse registry and to local offices of the department; and all records generated as a result of such processes and reports, shall be confidential and exempt from other provisions of law, and shall not be disclosed, except" under certain limited circumstances. T.C.A. § 37-1-612(a) (2006). Although this statute places most department records concerning child sexual abuse beyond the reach of a general request for discovery pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure, *see generally State v. Gibson*, 973 S.W.2d 231 (Tenn. Crim. App. 1997), the statute does nothing to alter the State's duty to disclose upon request exculpatory evidence in its possession to the accused in a criminal case.

neither written summary was exculpatory. During her interview at the CAC, H.R. denied all sexual contact except K.R.'s and the defendant's attempts to penetrate her anally. A statement by a victim that the defendant did not engage in the charged conduct satisfies the simplest definition of the term exculpatory, and the State's position at trial that H.R.'s statement was not exculpatory is incomprehensible. The exculpatory value of K.R.'s statement is less clear because his statement, standing alone, completely inculpates the defendant. Considered together with H.R.'s statement, however, K.R.'s statement becomes valuable for the marked inconsistencies between the two. In our view, both statements qualify as exculpatory and should have been disclosed to the defendant prior to the trial.

Because the State eventually disclosed the documents to the defendant, we must determine whether the defendant was prejudiced by the delay in disclosure. Although the defendant claims on appeal that earlier disclosure would have permitted him a more thorough cross-examination of the victims, the record belies this assertion. The record establishes that both victims were cross-examined, as the trial court said, "in minute detail" regarding the contents of the CAC interviews. Defense counsel left no stone unturned in regards to the statements, bordering on belligerence when referencing them during cross-examination of H.R. Despite having the option to do so, the defendant chose not to recall K.R. in order to question him about H.R.'s statement. Both H.R. and Sergeant Starnes, however, were asked repeatedly whether H.R. had denied all forms of sexual contact except anal penetration. Indeed, the jury acquitted the defendant of count two, which alleged rape of a child based upon H.R.'s performing fellatio on the defendant; count three, which alleged rape of a child based upon the defendant's performing cunnilingus on H.R.; and count five, which alleged the defendant's solicitation of H.R. to perform fellatio on K.R. Under these circumstances, we cannot say that the defendant was prejudiced by the delayed disclosure of the CAC interviews.

The defendant complains that the error occasioned by the State's failure to timely disclose the documents "was further compounded by the additional inexcusable improper statements by the State during . . . closing argument." He argues that the trial court should have declared a mistrial when the prosecutor made "egregious comment[s]" about defense counsel's presentation of the defendant's case, and he claims that he is entitled to a new trial on the basis of the improper and inflammatory statements during closing argument.

Initially, the State correctly points out that the defendant did not lodge a contemporaneous objection to the prosecutor's closing argument. Appellate relief is generally not available when a party has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a); *see State v. Killebrew*, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988) (waiver applies when the defendant fails to make a contemporaneous objection); *see also State v. Jenkins*, 733 S.W.2d

528, 532 (Tenn. Crim. App. 1987); *State v. Rhoden*, 739 S.W.2d 6, 11-12, 18 (Tenn. Crim. App. 1987).

Because the defendant failed to lodge a contemporaneous objection to the prosecutor's argument, our review is limited to a determination whether the argument constitutes plain error on the record. *See* Tenn. R. App. P. 36(b). Before an error may be so recognized, however, it "must be 'plain' and it must affect a 'substantial right' of the accused." *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). The word "'plain' is synonymous with 'clear' or equivalently 'obvious.'" *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993) (citing *United States v. Young*, 470 U.S. 1, 16 n.14, 105 S. Ct. 1038, 1047 (1985)). Authority to correct an otherwise "forfeited error" lies strictly "within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 732 (citations omitted).

In *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000), our supreme court adopted the definition of "substantial right" promulgated by this court in *Adkisson*. There, we held that "a 'substantial right' is a right of 'fundamental proportions in the indictment process, a right to the proof of every element of the offense, and is constitutional in nature.'" *Adkisson*, 899 S.W.2d at 639. Our supreme court also adopted *Adkisson's* five factor test for determining whether an error should be recognized plain:

> "(a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d)the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is 'necessary to do substantial justice.'"

Id. (quoting *Adkisson*, 899 S.W.2d at 641-42). "[A]ll five factors must be established by the record before this court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* at 283. To be reviewable as "plain," the error "must [have been] of such a great magnitude that it probably changed the outcome of the trial.'" *Id.* (quoting *Adkisson*, 899 S.W.2d at 642) (alteration in original). Finally, "the burden of establishing entitlement to relief for plain error is on the defendant claiming it." *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S. Ct. 2333, 2340 (2004).

As indicated, the defendant complains about the propriety of the prosecutors' closing argument. Trial courts have substantial discretionary authority in determining the propriety of final argument, but the trial court must restrict any improper argument. *Sparks v. State*, 563 S.W.2d 564, 569-70 (Tenn. Crim. App. 1978). Most restrictions during final argument are placed upon the State, based in great measure upon the role of the prosecutor in the criminal justice system:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. . . .

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935). The State must refrain from argument designed to inflame the jury and should restrict its commentary to matters in evidence or issues at trial. More specifically, the prosecution is not permitted to reflect unfavorably upon defense counsel or the trial tactics employed during the course of the trial. *See Dupree v. State*, 219 Tenn. 492, 495-97, 410 S.W.2d 890, 891-92 (1967); *Moore v. State*, 159 Tenn. 112, 124, 17 S.W.2d 30, 35 (1929); *Watkins v. State*, 140 Tenn. 1, 8-9, 203 S.W. 344, 346 (1918); *McCracken v. State*, 489 S.W.2d 48, 50 (Tenn. Crim. App. 1972).

To be sure, closing argument for both parties "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." *State v. Sutton*, 562 S.W.2d 820, 823 (Tenn. 1978). To merit a new trial,

however, the argument must be so inflammatory or improper as to affect the verdict. *Harrington v. State*, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965). When determining the propriety of closing argument, this court considers the following factors:

> (1) The conduct complained of viewed in the context and in light of the facts and circumstances of the case[;]
> (2) [t]he curative measures undertaken by the court and the prosecution[;]
> (3) [t]he intent of the prosecutor in making the improper statements[;]
> (4) [t]he cumulative effect of the improper conduct and any other errors in the record [; and]
> (5) [t]he relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

In this case, the prosecutor interjected the following inappropriate commentary into his closing argument:

> One last thing I want to tell you about before I sit down and you hear from Mr. Beard is this: I've learned something in this trial. I've learned how to defend a child rapist, because you spend as minimal amount of time as you can on the day that it happened and instead you attack the children for what happened afterwards . . . . You attack the kids for something they have no control over. You keep on the attack, you make snide comments, you bounce around the courtroom unprofessionally and you try to keep your, try to keep your attention off the facts of this case because that's not where he wants them to be.

Following defense counsel's closing argument, a second prosecutor made the following improper remarks in her rebuttal:

> Do you have a reasonable doubt, is there reason to doubt? Well, I asked you to use your common sense, right? So we'll get back to that. But I tell you, I have listened, for days and days, as [defense counsel] abused, beat up these two children, who have come in here to tell you about a horrible thing that happened. Come at them hard. And I have to say,

does it make sense to do this?

. . . .

> You have listened for a long, long time this week to a lot of people about a lot of things, but I want to leave you with this: If you're going to make this up, for whatever reason, would you . . . . subject yourself to this man [defense counsel] five years later?

Clearly, the prosecutors' personal criticism of defense counsel and the tactics employed by the defense were improper and most likely borne, the record establishes, from the rancorous relationship between the prosecutors and defense counsel. That being said, however, the record does not establish either that "the accused did not waive the issue for tactical reasons" or that "consideration of the error is 'necessary to do substantial justice.'" *See Smith*, 24 S.W.3d at 282. Accordingly, we cannot say that the error rises to the level of "plain."

II. Sufficiency of the Evidence

The defendant argues that the evidence adduced at trial was insufficient to support his convictions of rape of a child and solicitation of rape of a child. Specifically, he claims that the victims' testimony "was completely contradictory and inconsistent as to the sexual acts which allegedly occurred" and that "the victim of the alleged anal penetration stated that the defendant only attempted penetration, getting so far only as placing his penis up to her buttocks." The State submits that the evidence is sufficient.[3]

We review the defendant's claim mindful that our standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

[3] The State contends that sufficient evidence undergirds the defendant's conviction for rape of a child in count one because "K.R. testified that the defendant licked H.R.'s vagina, which constitutes cunnilingus, and is a form of penetration under the statute." The State's election of offenses, however, clearly establishes that the conduct charged in count one was the defendant's penetrating H.R.'s anus with his penis.

When examining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

"Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522(a) (1997). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." *Id.* § 39-13-501(7). "Whoever, by means of oral, written or electronic communication, directly or through another, intentionally commands, requests or hires another to commit a criminal offense, or attempts to command, request or hire another to commit a criminal offense, with the intent that the criminal offense be committed, is guilty of the offense of solicitation." *Id.* § 39-12-102(a).

Here, the defendant was convicted of rape of a child in count four for directing K.R. to penetrate the defendant's anus with his penis, with rape of a child in count one for penetrating H.R.'s anus with his penis, and with solicitation of rape of a child in count six for directing K.R. to perform oral sex on H.R. At trial, K.R. testified that the defendant allowed him and H.R. to drink alcoholic beverages, engaged them in a game of "strip poker," and then asked K.R. to penetrate the defendant's anus with his penis. K.R. recalled that the defendant's anus felt "loose." H.R. confirmed that K.R. penetrated the defendant's anus with his penis. This testimony sufficiently establishes the offense of rape of a child.

K.R. also testified that the defendant urged him to perform oral sex on H.R. Although H.R. denied that K.R. had placed his mouth on her vagina, the jury, which heard and saw the witnesses first hand, was free to reject H.R.'s denial and accredit K.R.'s testimony. Although the defendant argues that the testimony of the victims was so inconsistent as to be unbelievable, we decline his invitation to revisit the credibility of the witnesses, a determination that lies solely within the purview of the jury as the trier of fact. The defendant's urging K.R. to place his mouth on H.R.'s vagina meets the elements of solicitation of rape of a child, and K.R.'s testimony supports the defendant's conviction for this offense.

Finally, H.R. testified that the defendant "tried to put his wiener in [her] butt" and agreed that the defendant's penis did not "enter [her] body." She stated, "They put it up

to it and tried to put it in, just how you would imagine so." She said she could tell that the defendant was trying to penetrate her anus with his penis "[b]ecause [she] felt him . . . . [o]n [her] butt." She described the action as "[u]ncomfortable." Our supreme court has held the evidence sufficient to establish penetration where the proof showed that a defendant "pressed his penis against [the victim's] vulva with his hand." *State v. Bowles*, 52 S.W.3d 69, 74 (Tenn. 2001). The *Bowles* court noted that "[t]he occurrence of penetration, even though penetration is statutorily defined, is a question of fact." *Id.* The court also emphasized that penetration could be established by proof of even the slightest intrusion. *Id.* ("'[T]here is . . . 'sexual penetration' in a legal sense if there is the slightest penetration . . . .'" (quoting *Hart v. State*, 21 S.W.3d 901, 905 (Tenn. 2000))). In addition, this court has held the proof of penetration sufficient "even without evidence of full . . . intrusion of the victim's anal opening." *State v. Charles L. Williams*, No. M2005-00836-CCA-R3-CD, slip op. at 16 (Tenn. Crim. App., Nashville, Nov. 29, 2006). We have also deemed the evidence of penetration sufficient where the victim "testified that the defendant's penis had touched the inside of his 'butt' and that it was '[p]ainful.'" *State v. Ray Charles Gasaway*, No. 01C01-9703-CR-00101, slip op. at 4 (Tenn. Crim. App., Nashville, Mar. 24, 1998). Although the question of penetration is close, it is our view that the State presented sufficient evidence from which the jury could infer that the defendant penetrated H.R.'s anus, at least slightly, with his penis.

III. Right to Present a Defense

The defendant claims that the trial court deprived him of the right to present a defense when it ruled that the defendant would be prohibited from admitting evidence that the victims were motivated to fabricate the allegations after the defendant reported to their mother that they had been using drugs with their mother's boyfriend. We need not tarry long over the defendant's claim, however, because the record establishes that the trial court did permit the defendant to testify that K.R. told the defendant that Victor Koyak had been smoking marijuana with him and that the defendant told the victims' mother about the drug use. In addition, defense counsel argued during his closing argument that the victims had been motivated to fabricate the story because the defendant had revealed their drug use. Although the defendant contends that he should have been permitted to question Sergeant Starnes and Ms. Schlief about the victims' alleged drug use "to corroborate" the defendant's testimony, he overlooks the fact that any information Sergeant Starnes or Ms. Schlief had regarding the children's drug use would have been inadmissible hearsay. *See* Tenn. R. Evid. 801. Indeed, Ms. Schlief knew of the alleged drug use because the defendant told her about it, and Sergeant Starnes's information came from recorded telephone conversations between the defendant and the victims' mother. In consequence, the evidence, which was marginally relevant at best, would not have been admissible through anyone other than the defendant anyway. Accordingly, we cannot say that the trial court erred by limiting the presentation of

this evidence to the defendant's testimony.

IV. H.R.'s Letter

The defendant also contends that the trial court erred by prohibiting him from admitting into evidence a letter H.R. wrote to her father in 2007. He argues that the court should have admitted the letter so that the jury could compare it to the document allegedly written by H.R. in 2005 which said "My papaw didn[']t rape me." The State contends that the trial court appropriately excluded the letter because of its irrelevant content. We agree with the State.

The record clearly establishes that although defense counsel claimed he wanted the jury to examine the letter so as to compare it with the 2005 writing, he truly desired the admission of the letter because of its damaging contents. In the letter, H.R. admits using drugs with her mother's boyfriend, "Terry," at the time; that she planned to "go on the run" with Terry to avoid being sent to a group home; that she worked at a deli and was being paid "under the table"; that she was surprised that K.R. could pass a drug test to get a job; and that she had essentially dropped out of school. None of this information was relevant, *see* Tenn. R. Evid. 401, much of the letter was inadmissible hearsay, *see id.* at 801, and the jury had other, less prejudicial, handwriting examples to compare with the 2005 writing. Moreover, the defendant's own handwriting expert testified that he had reviewed the letter as a "known" example of H.R.'s handwriting and used it to conclude that H.R. was "probably" the writer of the 2005 writing. Under these circumstances, we cannot say that the trial court erred by prohibiting the admission of the 2007 letter.

V. Cumulative Error

In his last claim for relief, the defendant argues that cumulative errors denied him the right to a fair trial. Although we have concluded that the State erred by failing to disclose the CAC interview summaries in a timely manner and by engaging in improper argument, we cannot say that these errors, considered in the context of the record as a whole, deprived the defendant of a fair trial. Indeed, the jury's decision to acquit the defendant of three of the charged offenses militates against a finding that the jury's judgment was overwhelmed by an accumulation of errors. The jury's verdict suggests that the jury was clearly able to parse the proof offered by the State and arrive at correct factual and legal conclusions supported only by the proof adduced at trial.

VI. Conclusion

Although the State should have disclosed the victims' CAC interview

summaries to the defendant prior to trial, the defendant failed to establish that he was prejudiced by the untimely delay. Additionally, the State's closing argument, although improper and inflammatory, did not rise to the level of plain error. Further, the proof adduced at trial was sufficient to support the defendant's convictions for two counts of rape of a child and one count of solicitation of rape of a child. Because the defendant was permitted to testify that the victims' were motivated to lie because the defendant told their mother they had been using drugs, the defendant was not deprived of the right to present a defense. Moreover, the trial court did not err by prohibiting the defendant from introducing into evidence a letter H.R. wrote to her father in 2007. Finally, the defendant was not deprived of a fair trial by the cumulative effect of the State's errors. Accordingly, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE